No. 25-466

In the Supreme Court of the United States

ONGKARUCK SRIPETCH, PETITIONER

v.

U.S. SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A. Under *Liu*'s Authoritative Construction, Disgorgement Without Pecuniary Harm Violates Traditional Equitable Limits And Constitutes An Impermissible Penalty—And The Government Errs In Attempting To Rewrite *Liu*

1. As petitioner established (Br. 15-20), *Liu* analyzed disgorgement under Section 78u(d), and it reaffirmed every key principle that effectively resolves this case. As *Liu* explained, disgorgement is a traditional equitable remedy. *Liu* v. *SEC*, 591 U.S. 71, 76 n.1, 80 (2020). It cannot be a punishment or deterrent. *Id.* at 77; see also *Kokesh* v. *SEC*, 581 U.S. 455, 462, 467 (2017). It instead "restor[es] the status quo" and provides "fair compensation"—which necessarily contemplates *losses to compensate*. *Liu*, 591 U.S. at 80 (internal quotation marks omitted); *SEC* v. *Jarkesy*, 603 U.S. 109, 124 (2024) ("equit[y]" "restore[s] the victim"); *SEC* v. *Govil*, 86 F.4th 89, 103 (2d Cir. 2023) ("[t]he *return* of funds presupposes pecuniary harm," as "[f]unds cannot be returned if there was no deprivation in the first place"). And while equity generally authorizes "courts to strip wrongdoers of their ill-gotten gains," that "principle[]" is strictly cabined "to avoid transforming an equitable remedy into a punitive sanction": disgorgement is "restricted" to "an individual wrongdoer's net profits *to be awarded for victims*." *Id.* at 79 (emphasis added).

Liu established these principles in a freestanding section of its opinion tracing equity jurisprudence—without regard to the specific language of Section 78u(d). See 591 U.S. at 78-87 (Part II); see also Pet. Br. 19-20 (so explaining). *Liu* instead focused on the nature of disgorgement as an equitable remedy; its non-punitive nature; and its essential function in restoring property and providing compensation. In short, if "the SEC is not obligated to return any money to victims," "[s]uch a penalty by definition

does not 'restore the status quo' and can make no pretense of being equitable." *Jarkesy*, 603 U.S. at 124; *Kokesh*, 581 U.S. at 465 (explaining that, *pre-Liu*, "SEC disgorgement" "bears all the hallmarks of a penalty" because "it is intended to deter, not compensate"); see also *Liu*, 591 U.S. at 85-86 (faulting the lower courts' "version of the SEC's disgorgement remedy" for "exceed[ing] the bounds of traditional equitable principles").

And because disgorgement itself is an equitable remedy (*Liu*, 591 U.S. at 76 n.1, 80; *Tull* v. *United States*, 481 U.S. 412, 424 (1987)), it is bound by this guiding "equitable principle": a "wrongdoer" cannot "be punished by 'pay[ing] more than a fair compensation to the person wronged.'" *Liu*, 591 U.S. at 80 (quoting *Tilghman* v. *Proctor*, 125 U.S. 136, 145-146 (1888)); see also *id.* at 102 (Thomas, J., dissenting) ("the award should be used to compensate victims"; "[p]laintiffs in equity may claim 'that which, *ex aequo et bono* [according to what is equitable and good], is theirs, and nothing beyond this'") (bracketed text in original).[1]

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[1] The government takes issue with how petitioner cited *Kokesh* in his brief, suggesting he failed to note that pre-*Liu* "SEC disgorgement is *not* compensatory." U.S. Br. 15 n.* (quoting Pet. Br. 15 and *Kokesh*, 581 U.S. at 464) (emphasis added). This entirely misses the point: *Liu* confirmed that equitable remedies (like disgorgement) cannot be punitive, and it accordingly rejected old "SEC disgorgement" as *non-compensatory*—because true equitable remedies (like disgorgement) *are* "compensat[ory]." 591 U.S. at 80, 85-87. Petitioner's point was to highlight the *contrast* between equitable and legal remedies, and "compensation" is a key factor in that calculus. See, *e.g.*, *Kokesh*, 581 U.S. at 462 ("a pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment and to deter others from offending in like manner'—as opposed to *compensating a victim for his loss*") (emphasis added). In any event, *Liu* established that disgorgement's core purpose is indeed "'compensat[ory].'" 591 U.S. at 80; contra U.S. Br. 15.

2. The government's contrary view violates core precepts of disgorgement and stands *Liu* on its head. It embraces disgorgement as entirely punitive. Br. 15 ("the essential function of disgorgement is to strip wrongdoers of their wrongful gains"); *id.* at 24-26. It says no disgorged funds have to be returned to investors. *Id.* at 33, 35. It claims divesting ill-gotten gains is a sole permissible objective. *Id.* at 31. It insists disgorgement has nothing to do with restoring or compensating loss. *Id.* at 15. And it maintains that *Liu*'s contrary position (if the government thinks *Liu* can be read this way at all) is rooted exclusively in Section 78u(d)(5)'s specific text—requiring "equitable relief" "for the benefit of investors." *Id.* at 27. But it says "disgorgement" otherwise can legitimately focus (full stop) on "depriving" wrongdoers of ill-gotten gains. *Id.* at 14; see also *id.* at 12-13.

If these arguments sound familiar, that is because they are. Twice over. This Court effectively rejected the same arguments in *Liu* (*e.g.*, 591 U.S. at 85-88), and petitioner already refuted each of these points here (Pet. Br. 17-20). The government now essentially admits it is seeking a penalty, which it obviously is (Pet. Br. 19 (so establishing))—despite *Liu* declaring punitive relief off-limits (*e.g.*, 591 U.S. at 77, 79-80). The government repeatedly invokes *Liu*'s "[f]irst" principle of disgorgement ("strip[ping] wrongdoers of their ill-gotten gains," 591 U.S. at 79)—while refusing to acknowledge "the *countervailing* principle" that "wrongdoer[s] should not be punished by 'pay[ing] more than a fair compensation to the person wronged'" (*id.* at 80). And the government, astoundingly, (re)invokes the *same* body of pre-*Liu*

lower-court SEC disgorgement decisions (Br. 24-26, 31, 35-36) that *Liu* itself *repudiated* (591 U.S. at 85-86 & n.3).[2]

If the government wishes to stand entirely on the proposition that Congress upended everything with its post-*Liu* 2021 amendments, it is certainly free to do so (wrong as it is). But the government should at least candidly admit it loses under any fair reading of *Liu*—and it prevails only if it can establish Congress (silently) *overruled Liu*'s definitive construction of "disgorgement." But there is no genuine reading of *Liu* that supports the government here.

Nor can the government sidestep *Liu*'s holding by suggesting "the Court had no occasion to construe or define" disgorgement." U.S. Br. 31 (so suggesting because "the statute at issue * * * did not contain the word 'disgorgement'"). This is wishing thinking. The Court's entire analysis targeted disgorgement, analyzed its traditional roots, outlined its permissible boundaries, and explained when it could (and could not) be employed. It is fanciful to suggest *Liu* did not settle the term's meaning.[3]

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[2] The government at least now tacitly acknowledges that *Liu*'s holding rested on both Section 78u(d)(5)'s text *and* equitable principles (Br. 31)—but it still gives short shrift to the controlling equity-only section of *Liu*'s opinion. See Pet. Br. 19-20.

[3] The government again trots out the same argument that disgorgement's focus on net gain (not victim loss) somehow shows that victim loss is irrelevant. Br. 16. Petitioner refuted this before (Br. 18-19), and the government remains wrong. Disgorgement's profit-focus measure ensures the remedy does not become punitive (which it would if a defendant were forced to turn over funds exceeding gains); and it likewise promotes disgorgement's core objective: reallocating property to its proper owner. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 216 (2002); *Harris Tr. & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-251 (2000); *United States* v. *Carter*, 217 U.S. 286, 308 (1910). The gain reflects the sum

3. Perhaps because it realizes *Liu* forecloses its position, the government instead focuses on other equitable authorities. See, *e.g.*, U.S. Br. 17, 18-20. But the government misunderstands when parties can theoretically recover without loss: when enrichment goes to an "uninjured" victim, it does so because the victim has an *underlying substantive entitlement* to the funds. See, *e.g.*, *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456 (1932) ("'The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right.'"); *Olwell* v. *Nye & Nissen Co.*, 173 P.2d 652, 654 (Wash. 1946) ("'[a]ctions for restitution have for their primary purpose taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled'"). And in those cases, the failure to convey those funds is itself best understood *as a pecuniary loss*. See also Part D, *infra*.

But there is no such loss here. In this setting, any investor award would be a windfall. It would not "restore the status quo" (a core condition for disgorgement), *e.g.*, *Jarkesy*, 603 U.S. at 123-124, but instead would *change* the status quo and leave an uninjured party better off—despite Congress's separate determination that such parties have no right to sue or recover in this context. See Pet. Br. 25-26. And because such a remedy serves no remedial purpose, it would indeed become an impermissible penalty. *E.g.*, *Jarkesy*, 603 U.S. at 123-124; *Kokesh*, 581 U.S. at 462. *Liu* simply applies these uniform background principles to this particular setting.

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the court can equitably assign to the party justly entitled to it. But any attempt to exceed that gain drifts beyond equity and veers into penalties and damages.

Latching onto a single sentence from Justice Thomas's *Spokeo* concurrence, the government says parties can seek unjust enrichment without showing pecuniary harm. Br. 10-11, 19-20, 29 (citing *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 344 (2016) (Thomas, J., concurring)). There may indeed be contexts where parties can recover without pecuniary harm (in a sense)—again, because the *underlying substantive law* grants that party a right to any enrichment. *E.g.*, *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946) ("restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant"). Even there, the better understanding is the parties entitled to gains *do* suffer loss—in the failure to voluntarily turn over proceeds that rightfully belong to them. *E.g.*, *Raven Red Ash Coal Co.* v. *Ball*, 39 S.E.2d 231, 235, 238 & n.2 (Va. 1946). In any event, again, there is no such underlying substantive right here: an uninjured investor has no right to recover a third party's gains without showing economic loss. *E.g.*, 15 U.S.C. 78u-4(b)(4). So unlike other settings (copyrights, patents, trust beneficiaries, principals/agents, landlords/tenants, etc.), pecuniary loss *is* necessary to establish any right to relief.

4. According to the government, petitioner's theory under *Liu* is ultimately arbitrary—because supposedly *any* showing that even a single investor lost $1 would be sufficient to disgorge the entirety of a defendant's net gains. U.S. Br. 2, 16. The government misstates petitioner's theory and misunderstands the point of disgorgement.

As *Liu* confirmed, disgorgement is limited to *restoring the status quo*; it precludes windfalls, and prohibits "punish[ing]" a wrongdoer "by 'pay[ing] *more than a fair compensation* to the person wronged.'" *Liu*, 591 U.S. at 80 (emphasis added); *id.* at 102 (Thomas, J., dissenting) (recovery "compensate[s] victims" for what "in equity" "is

theirs, and *nothing beyond this*'") (emphasis added). Equitable relief is limited to those amounts where a party has a rightful claim; a $1 injury does not create a rightful claim to anything *beyond* $1. *E.g.*, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399, 405-406 (1940). Any excess amount would be a punishment and a windfall, and it is precluded by traditional equitable bounds. *Id.* at 405-406.

To be sure, the government can always seek *penalties* and properly target a wrongdoer's full "gross" proceeds. 15 U.S.C. 78u(d)(3)(B). But there is no basis for distorting equitable principles and awarding windfalls to uninjured investors simply because the government would rather end-run substantive and procedural safeguards for penal relief. *E.g.*, *Jarkesy*, 603 U.S. at 123-124 (requiring jury trial); Former SEC Attorneys Amicus Br. 6-8.

B. Congress Confirmed *Liu*'s Traditional Limits On Disgorgement With Its Post-*Liu* Statutory Enactment—And The Government Is Wrong That Congress Silently Rejected One-Third Of *Liu*'s Holding

1. *Liu* confirmed what disgorgement is and what it is not, and Congress necessarily ratified *Liu*'s holding when it wrote "disgorgement" directly into Section 78u(d)(7). Pet. Br. 20-25. If Congress wished to override *Liu* or depart from its traditional common-law meaning, Congress would have included *some* textual hint to that effect. Instead, its post-*Liu* enactment reiterated verbatim the very term ("disgorgement") this Court had just defined. Without explanation, guidance, modification, or change. There is no direct hint that Congress disagreed with *Liu*'s take or rejected the "old soil" accompanying this term of art. Pet. Br. 21-23. It accordingly follows that Congress incorporated this settled meaning directly into the statute.

2. The government reaches the opposite conclusion, but its position fails across the board.

a. The government first suggests Congress was necessarily adopting the pre-*Liu* lower-court decisions that *Liu* had just repudiated. Br. 27, 30-39. This is absurd. The relevant presumption is Congress adopts *this* Court's holdings, not lower-court decisions. And Congress surely does not (silently) embrace scattershot lower-court precedent this Court has *rejected*.

Congress is always free to respond to this Court's holdings. But it is implausible Congress flipped this Court's position on its head by codifying the same term and simply assuming courts would presume Congress adopted the opposite meaning. And that is especially true here: *Liu* itself had just instructed this is *not* how Congress would alter disgorgement's meaning: "Congress does not enlarge the breadth of an equitable, profit-based remedy simply by using the term 'disgorgement'" (*Liu*, 591 U.S. at 86)—which describes precisely what Congress did.

Simply put: Congress did not reject this Court's understanding of "disgorgement" by *codifying the term disgorgement*—in the same statutory section this Court had just addressed—all to cryptically restore a preexisting body of disavowed lower-court decisions. The alternative is obvious: Congress understood disgorgement to mean *what this Court had just said it meant*. And whether the government agrees with this Court's construction or not, that interpretation is now embedded in the U.S. Code.

b. The government next suggests Congress resorted to dictionary definitions or lay understandings over *Liu*'s on-point construction of a term of art. U.S. Br. 14, 16-17. It is not difficult to decide whether Congress's post-*Liu* enactment means (a) the remedy *Liu* delineated, or (b) "'eject (food) from the throat or mouth'" (U.S. Br. 14). The

government's take is not how it works when construing terms of art imbued with settled common-law meaning. See Pet. Br. 22-23.

c. Contrary to the government's contention (Br. 31), nor is "disgorgement" in Section 78u(d)(7) some kind of SEC-specific term of art. As petitioner already explained (Br. 23), there was no need to reiterate disgorgement's definition when *Liu* already embedded that core meaning into the term itself.

Nor does the government fare any better by focusing on Section 78u(d)(3)'s reference to "unjust enrichment." Br. 20. The government's reading would render the key clause—"disgorgement under paragraph (7)"—superfluous. See U.S. Br. 20 (inadvertently conceding—by quoting the provision while omitting the key clause). As previously explained (Pet. Br. 24), the operative term is still "disgorgement," and parties must still satisfy disgorgement's bounds. Congress did not rewrite the core remedy by labeling the amounts ("unjust enrichment") that might properly belong to an injured investor.

d. The government also faults petitioner for ignoring other features of Congress's post-*Liu* enactment. According to the government, Congress expressly adopted two of *Liu*'s limitations (in Section 78u(d)(3)(A)(ii)), implicitly rejected the third ("used to compensate victims"), and did so by using the term "disgorgement"—which this Court had just defined and limited to its traditional common-law scope. See Br. 32-36, 38-39 (suggesting Congress ratified "some but not all" of *Liu*).

This again is implausible. Congress does not override a decision of this Court by negative implication in a *subsidiary* provision of the Act, especially when that subsection indisputably adopts *every other aspect of the decision*.

If anything, this confirms Congress was implementing *Liu*, not dismantling it.[4]

e. The government finally contests (Br. 37) petitioner's position that Congress added Section 78u(d)(7) as part of a restructuring to restore the limitations period indirectly eliminated by *Liu*. Pet. Br. 24-25. And the government correctly points out that Congress tinkered with the entire limitations regime when it added these provisions.

Yet the government does not dispute that *Liu* left SEC disgorgement with no limitations period at all. Pet. Br. 24. Nor does the government dispute that the 2021 amendments in fact filled that gap. Nor, finally, does the government have a real answer for Congress's apparent drafting choice to separate out disgorgement *so it could assign a limitations period to these claims*. Those are the *relevant* points—and they confirm Congress was indeed ratifying *Liu*.

C. The Act's Context And Purpose Further Confirm That Disgorgement Requires Pecuniary Loss—Which The Government Fails To Refute

1. As previously established (Br. 25-28), Section 78u(d)'s context and purpose reinforce that disgorgement requires pecuniary loss. The government effectively has no response.

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[4] The government invokes two provisions governing the interaction between SEC disgorgement and victims' own private suits for recovery. Br. 23. Section 78u(d)(9) prevents the disgorgement authority "in paragraph (7)" from being "construed as altering any right that any private party may have to maintain a suit for a violation of this chapter." 15 U.S.C. 78u(d)(9). Section 78u(g) prevents consolidation or coordination of SEC actions for equitable relief with private suits. 15 U.S.C. 78u(g). That disgorgement might otherwise overlap with private suits is the very premise of these provisions—if anything, these confirm that disgorgement compensates victims.

a. First, the government cannot explain why the same investors should collect the same funds for the same misconduct in SEC actions that Congress explicitly prohibited them from collecting in private suits. Br. 25-26. The government's only semi-response: Congress was concerned about abusive private securities litigation, whereas there is supposedly no comparable concern for SEC enforcement actions. Br. 23.

This is a non-sequitur. The limitations on recovery reflect Congress's judgment that uninjured investors *are not entitled to recover* in certain settings. Yet the government's interpretation of its disgorgement authority would permit uninjured investors to receive a windfall through the SEC, even though those same investors would receive *nothing* in private litigation. The disconnect is obvious.

b. Second, the government cannot explain why Congress would effectively authorize *two* penalties in the same provision, each capped at different amounts, each with different labels—but each otherwise operating identically. Pet. Br. 26-27. This is not how Congress drafts statutes. Petitioner's reading, by contrast, assigns each remedy a different purpose: one penalizes the wrongdoer (civil penalties), and the other restores the status quo and returns funds to injured investors (disgorgement). There is no reason to construe the statute to introduce a second round of penalties into a section that *already* covers penalties.

c. Third, the government has no response—literally—to the obvious upshot of the government's reading: it would frustrate Congress's calibrated scheme and invite the SEC to subvert important procedural safeguards—including jury rights for penalty actions. Pet. Br. 27-28. Indeed, the government's position would permit the SEC to evade a jury trial (and the substantive criteria for penal-

ties) by simply recasting a penalty claim as a disgorgement request. The government cannot explain why Congress would implement a roadmap to so easily end-run the requirements for seeking penalties.

2. While the government has no answer for petitioner's points about the Act's context and purpose, it does offer a few separate points of its own. Each is meritless.

a. First, the government cites a tiny handful of other sections that reference economic loss, and suggests Congress would have included similar language in Section 78u(d)(7) if it intended a similar requirement to apply to disgorgement. U.S. Br. 21-24. Yet in each example, Congress had a clear reason to specify the existence of investor loss—and there was no comparable term of art to capture the requirement. Here, by contrast, the term "disgorgement" itself does all the work. That term *alone* means "restoring the status quo" and providing "fair compensation" to injured parties. *Liu*, 591 U.S. at 80. Just as Congress does not always define terms with settled meanings, it had no reason to define "disgorgement" here.

b. Second, the government maintains that "[t]he Dodd-Frank Act amended the Exchange Act to require that any disgorgement that is recovered by the SEC but is not 'distributed to victims' must be deposited in the Commission's Investor Protection Fund." Br. 24 (citing 15 U.S.C. 78u-6(g)(3)(A)(i)). And the government further observes that "Congress's evident recognition that the Commission may use disgorged funds for purposes other than distribution to victims" proves disgorgement is "independent of any showing of investor loss." *Ibid.*

First and foremost, the government fails to reproduce the full text: Congress was not explicitly addressing "disgorgement" that was not distributed to victims; it addressed "any monetary sanction" not "otherwise distributed to victims." 15 U.S.C. 78u-6(g)(3)(A)(i). The phrase

"monetary sanction" better aligns with penalties than disgorgement—and, if anything, the fact Congress did not single out disgorgement (and thus might have intended solely penalties) undercuts the government's theory.

Second, the government overlooks that disgorged funds will not always be collected—just as class funds are not always distributed. Securities violations can affect large numbers of investors, and the SEC is not obligated to discuss recovery with each and every person before seeking relief (even if the SEC is required to track down the full information necessary to establish the proper amount of disgorgement). Any time a party does not collect disgorgement (for any reason), the government may have extra cash to deposit in the Fund—even if the government had to prove pecuniary harm (for every single dollar collected) before obtaining a disgorgement award. Either way, this is far too thin a read to overcome *Liu* and the traditional limits on disgorgement.

D. The Government Cannot Use The Restatement To Override *Liu* Or The Traditional Limits On Disgorgement

As previously established, there is no basis for thinking Congress read the Restatement's detailed provisions and plucked out the relevant reporter's notes and comments to devise an atypical form of disgorgement that departs from *Liu* and this Court's traditional principles.

But even putting the implausible aside, the government has misread the Restatement and its other common-law sources. Properly understood, disgorgement restores funds to the proper owner—which necessarily means a victim must be out of pocket. But that does not necessarily mean a victim suffered a *direct diminution of value*. If the *underlying substantive law* assigns a party a right to certain proceeds, the failure of the wrongdoer to voluntarily turn over those proceeds is itself the relevant "loss." This

answers the government's (and its amici's) concerns that petitioner's view would somehow rewrite the law in other areas. Not so at all. Each example they invoke involves a situation where a party is entitled (per underlying substantive law) to the gain—and thus the failure to turn over the gain itself is economic loss.

That, however, is the opposite of this situation: an investor has no right to funds without a showing of direct loss as a result of any violation. There is no underlying securities law that grants the right to any proceeds—and, indeed, the law expressly forecloses recovery in a private suit. Parties are not entitled to windfalls (here or elsewhere), which is precisely what disgorgement here would be.

While *Liu* already does the hard work—and while Congress's ratification of *Liu* forecloses further inquiry—these principles establish the government's error even as a matter of first principles. That itself reinforces petitioner's case and warrants reversal.

1. *Liu* traced disgorgement's lineage to three traditional equitable remedies—restitution, accounting for profits, and constructive trusts—each of which presupposes that the claimant has lost something of monetary value. See Pet. Br. 29-32. This Court has said time and again: restitution "restor[es] the status quo and order[s] the return of that which rightfully belongs" to the victim. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946); *Tull* v. *United States*, 481 U.S. 412, 422, 424 (1987). Accounting and constructive trusts follow suit, awarding profits as "an equitable measure of compensation" to "the true owner." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916). And this Court has rejected accounting claims when the claimants have not suffered pecuniary harm. *Kilbourn* v. *Sunderland*, 130 U.S. 505, 516-517 (1889).

The government does not meaningfully dispute any of that. Its only response is to cherry-pick from three sources. U.S. Br. 30.

The government first focuses on a line in American Jurisprudence that describes modern trends, U.S. Br. 30—while ignoring the same source's statement that the "*earlier common law*" used "restitution" to "denote the return or restoration of a specific thing or condition." 66 Am. Jur. 2d Restitution § 1 (emphasis added). This Court's precedent rightfully follows that earlier common law tradition. See, *e.g.*, *Porter*, 328 U.S. at 402.

Next, the government insists that *Leman* v. *Krentler-Arnold Hinge Last Co.* stands for the proposition that "'actual pecuniary loss' [is] not required for accounting." U.S. Br. 30 (quoting *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456 (1932)). Not so. What *Leman* actually said was that an accounting was *not "measured" by "damages*, in the sense of actual pecuniary loss." 284 U.S. at 456 (emphasis added).

When there was no "actual"—i.e., out-of-pocket—loss justifying damages at law, equity courts stepped in to compensate for a wider range of pecuniary harm. See *ibid.* (profits served as "a substitute for legal damages" to "insure full compensation to the party injured"). *Leman* is illustrative: the defendant unlawfully profited off the plaintiff's intellectual property, so the court restored those profits to their rightful owner—the plaintiff. That squarely supports petitioner's position. See Pet. Br. 31-32, 36; see, *e.g.*, *Liu*, 591 U.S. at 81-82 (describing equitable accounting in patent cases, where a plaintiff may recover "profits that the defendants have made by the use of his invention") (quotation omitted).

The government's cramped view of pecuniary harm also causes it to misread *United States* v. *Carter*, 217 U.S. 286 (1910). There, an Army officer skimmed secret profits

off deals he made on the government's behalf. *Id.* at 297. Because any "profit made by an agent in the execution of his agency must be accounted for to the principal," the Court concluded that the Army officer owed his profits to the government as a "debt." *Id.* at 308 (quotation omitted). The government had a right to the officer's profits and was at a financial loss for as long as the officer held them. *That is pecuniary harm.* Whether there was "actual loss"—*i.e.*, money taken from the government's pocket—was thus beside the point. *Id.* at 305.

In short, the government's foray into this Court's precedent surrounding restitution, accounting, and constructive trusts only confirms Petitioner's point: equitable disgorgement has always been tethered to the restoration of something with monetary value that rightfully belongs to a victim.[5]

2. The government next pivots to a handful of supposed counter-examples—each of which, under the correct view of pecuniary harm, reinforces petitioner's position.

Take *Olwell* v. *Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946), the government's lead example. The court held that to recover profits, the plaintiff must show that he "incurred a loss." 173 P.2d at 653. And the loss was monetary: the defendant profited from his use of the plaintiff's egg-washing machine without the plaintiff's permission, which made the plaintiff the "true owner" of those profits. See

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[5] Finding no support with restitution, accounting, or constructive trusts, the government retreats to *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011). Br. 19. That case involved a "surcharge"—*not* one of the profits-based equitable remedies underlying disgorgement. And the relief in *CIGNA* was loss-based, required "actual harm," and compensated the plaintiffs for "money owed" to them. 563 U.S. at 441, 444. *CIGNA* does not suggest disgorgement is available without pecuniary harm.

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916). The plaintiff was left short until the funds were restored. *That is pecuniary harm.* Pet. Br. 36; see, *e.g.*, *Knudson*, 534 U.S. at 214 & n.2 (accounting is available to recover "profits produced by the defendant's use of [the plaintiff's] property").

The same is true when a defendant unlawfully profits from a plaintiff's easement,[6] patent,[7] copyright,[8] trademark,[9] underground land,[10] "beet tops"[11]—or any other property.[12] Cases involving special relationships of trust fit the same mold: the wrongdoer acts on the victim's behalf, so any profit gained from that relationship belongs to the victim—and the victim stays in the hole until those funds are restored.[13] There may be no "actual" or out-of-pocket loss, but there is pecuniary harm. In each case, the

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[6] See, *e.g.*, *Raven Red Ash Coal Co.* v. *Ball*, 39 S.E.2d 231 (Va. 1946).

[7] See, *e.g.*, *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932); see also *Tilghman* v. *Proctor*, 125 U.S. 136, 145 (1888) ("[I]n equity the profits made by the infringer of a patent belong to the patentee and not to the infringer.").

[8] See, *e.g.*, *Sheldon* v. *MetroGoldwyn Pictures Corp.*, 309 U.S. 390 (1940).

[9] See, *e.g.*, *Hamilton-Brown Shoe Co.*, 240 U.S. 251.

[10] See, *e.g.*, *Edwards* v. *Lee's Administrator*, 96 S.W.2d 1028 (Ky. 1936).

[11] See, *e.g.*, *Corey* v. *Struve*, 149 P. 48 (Cal. 1915).

[12] As for *Federal Sugar Ref. Co.* v. *United States Sugar Equalization Bd.*, 268 F. 575 (S.D.N.Y. 1920): the government relies on a case with obvious pecuniary loss (losing a $200,000+ contract), and quotes a statement the court itself acknowledged was dicta. *Id.* at 583; U.S. Br. 19.

[13] See, *e.g.*, *Keech* v. *Sandford*, 25 Eng. Rep. 223 (Ch. 1726) (trustee and beneficiary); *Catts* v. *Phalen*, 43 U.S. (2 How.) 376 (1844) (employee and employer).

profits are in the defendant's possession, but the underlying substantive law assigns those profits to the plaintiff. Equity intervenes to "restor[e] the status quo and order[] the return of that which rightfully belongs" to the victim. *Porter*, 328 U.S. at 402.

Put simply, the case of uninjured securities investors stands on different footing: there is no "duty of restitution" when "the plaintiff was deprived of nothing due it," and "[n]othing was taken away from it which belonged to it." *Am. Univ.* v. *Forbes*, 183 A. 860, 862 (N.H. 1936). Unlike all its other examples, the government cannot identify any substantive right to the funds, and it cannot identify any loss warranting disgorgement.

4. Lastly, the government's reliance on academic sources does not change the fact that this Court has already resolved the common-law questions at issue in this case.

The government does not deny that the Restatement (Third) of Restitution and Unjust Enrichment—and its predecessors—openly depart from equity's traditional limits. Portions of the Restitution Restatements may be informative, but this Court has never adopted the Restatement's normative conclusions about whether equitable disgorgement requires a showing of pecuniary harm. And even on its own terms, the Restatement (Third) actually reinforces Petitioner's point: every one of its illustrations involves pecuniary harm, when viewed under the proper framework.

Nor does Dobbs help the government. Dobbs asserts that restitution is available when "the defendant has been unjustly enriched by receiving something * * * *that properly belongs to the plaintiff*." 1 Dan B. Dobbs, Law of Remedies § 4.1(2), at 371 (2d ed. 1993); see also *ibid.* (restitution "rectifies unjust enrichment by forcing restoration to the plaintiff").

In the end, none of this commentary changes the result. Congress was not looking at the Restatement, or Palmer, or Dobbs when it enacted Section 78u(d)(7)—it was looking at *Liu*. The SEC seeks to rewind to a pre-*Liu* world, canvassing pre-*Liu* decisions and scavenging for secondary sources that might support its position. *Liu* did the work. Congress adopted the output. And *that* is what "obviate[s] the need * * * for the sorts of wide-ranging historical inquiries in which the *Liu* Court engaged." U.S. Br. 38.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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